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## Defending the Despised: William Moses Kunstler

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## SPECIAL FEATURES

### DEFENDING THE DESPISED: WILLIAM MOSES KUNSTLER

Randall Coyne\*

#### *Beginnings*

"Care to join me in a little petty larceny?" With these words, radical defense lawyer William Kunstler reached into the newspaper vending machine at Will Rogers World Airport and removed *two* copies of the *Daily Oklahoman*. Before I could answer, Kunstler handed one to me and made me his accomplice. At that moment, I began to feel genuine affection for the man whose work I had for so many years admired.<sup>1</sup>

Kunstler's death at age seventy-six, on September 4, 1995, ended a remarkable career of frequently defending indefensible clients and, more than occasionally, winning unwinnable cases.<sup>2</sup> After a dozen years spent maintaining a quiet and relatively undistinguished traditional civil practice,<sup>3</sup> Kunstler received a phone call that dramatically altered the nature of his practice and started him on a journey which culminated in Kunstler

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1. The night before, November 6, 1992, Kunstler had addressed a large and enthusiastic audience at the University of Oklahoma in Norman. Students, faculty, and members of the community had gathered for a screening of *Incident at Oglala*, a documentary, directed by Robert Redford, which focuses on the notorious case of Leonard Peltier. Peltier, a Native American, had been convicted of the 1975 murders of two federal agents on the Pine Ridge Reservation in South Dakota. Kunstler, a member of Peltier's appellate defense team, had been invited to give remarks about the case and to explain the status of Peltier's appeals. For more about the Peltier case, *see infra* notes 56-88 and accompanying text.

2. Kunstler's career in criminal defense appears all the more remarkable when one considers its relatively late start. Kunstler graduated from Columbia Law School in 1948 and spent his first twelve years of private practice specializing in civil matters. WILLIAM M. KUNSTLER, MY LIFE AS A RADICAL LAWYER 82-84, 101-07 (1994) [hereinafter A RADICAL LAWYER]. Soon after he passed the New York State bar exam, Kunstler formed a small law firm with his younger brother, Michael. Their practice revolved around divorces and wills. William Kunstler summarized this period of his life for a reporter: "I was bored out of my skull." *Defending the Despised*, PEOPLE, Sept. 18, 1995, at 225.

3. Kunstler did perform at least one routine legal task for a client who, years later, would become notorious in his own right. As a result of a referral from Roy Cohn, a Columbia Law School classmate, Kunstler drafted a will for United States Senator Joseph McCarthy. Cohn and McCarthy had not yet embarked on their unholy crusade to eradicate communism in America. A RADICAL LAWYER, *supra* note 2, at 89.

becoming one of the most beloved<sup>4</sup> — and despised<sup>5</sup> — attorneys to practice this century.

Early on the morning of June 15, 1961, Rowland Watts of the American Civil Liberties Union (ACLU) called Kunstler and asked him to travel to Jackson, Mississippi to lend "moral support" to the "Freedom Riders." The Freedom Riders, primarily young men and women of both races, courageously rode interstate buses, trains and airplanes throughout the South, hoping to force the integration of segregated transportation facilities.<sup>6</sup> As Kunstler explained in his autobiography,

The Freedom Riders had been organized and sponsored by the Congress for Racial Equality (CORE) to fight the Jim Crow laws that ruled the South. Jim Crow mandated separation of the white and black races in all places of public accommodation: buses, bus terminals, airports, drinking fountains, toilets. . . . Freedom Riders began their historic bus rides on May 4, 1961. At every place they stopped, they were harassed, arrested, and brutalized. In Anniston, Alabama, for example, a bus was set afire, and its occupants severely beaten.<sup>7</sup>

Kunstler flew to Jackson that same evening. What Kunstler saw — the peaceful, dignified resolve of young demonstrators who bravely faced both the certainty of jail and the uncertainty of far worse — marked him permanently. Kunstler joined the battle, helping to draft habeas corpus petitions seeking the immediate release of the Freedom Riders. Although the

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4. According to Gerald Lefcourt, Kunstler received a letter dated January 23, 1994, which read, in pertinent part, as follows:

Dear Bill:

You might be interested to know, if you didn't already know that amongst me and my fellow prisoners you are a folk hero. There isn't a murderer, rapist, arsonist or major drug dealer who doesn't think of you as a great man. That includes the harasser of Joy Silverman.

— Warmest regards,  
[former New York Court of Appeals  
Chief Judge] Sol Wachtler.

*In Memoriam*, MOUTHPIECE (New York State Assoc. of Crim. Defense Lawyers), Sept./Oct. 1995, at 7 (vol. 3, no. 5) [hereinafter MOUTHPIECE].

5. In 1992, Ron Rosenbaum, writing for *Vanity Fair* magazine, branded Kunstler "the most hated lawyer in America." Gerald Lefcourt, who introduced Kunstler at the New York State Association of Criminal Defense Lawyers Annual Dinner in 1994, observed: "Bill Kunstler's enemies loathe him to the same degree that his clients adore him, and he takes pride in both." *Id.* at 8.

6. A RADICAL LAWYER, *supra* note 2, at 102.

7. *Id.*; see also MOUTHPIECE, *supra* note 4, at 8. "Waves of Freedom riders, violently harassed in Montgomery and Birmingham, were arrested en masse as they arrived at the bus, rail and air terminals of Jackson, Mississippi." *Id.*

petitions were dismissed,<sup>8</sup> forty-two-year-old William Kunstler had joined the civil rights movement.<sup>9</sup>

Undeterred by the failure of his habeas corpus petitions, Kunstler simply switched tactics. Personal experience taught Kunstler that the Freedom Riders would not receive fair trials in southern state courts. To remove these cases to federal court — and to remove his clients from the custody of murderous southern jailers — Kunstler relied upon a statute first passed during Reconstruction.<sup>10</sup> The statute essentially forced federal courts to accept criminal cases from state courts upon an allegation that the defendants would not receive fair trials in state court. Perhaps more important, the statute required the federal courts to set bail.<sup>11</sup>

Kunstler's ingenious work on the Freedom Rider cases quickly earned him a reputation as a zealous and dedicated advocate and attracted the attention of a young civil rights leader, Martin Luther King, Jr. Kunstler was invited to speak on the legal aspects of the civil rights movement at the Southern Christian Leadership Conference in Nashville in late September 1961.<sup>12</sup>

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8. Although it took nearly four years, the United States Supreme Court unanimously reversed the convictions of all the Jackson, Mississippi Freedom Riders on April 26, 1965. *Thomas v. Mississippi*, 380 U.S. 524 (1965).

9. A RADICAL LAWYER, *supra* note 2, at 103-05. Kunstler estimated that during 1961 and 1962, he devoted only ten percent of his time to civil rights cases. *Id.* at 112. However, Kunstler soon learned what undoubtedly was true for many prominent activists: "In the civil rights movement, first you got your feet wet, and soon you were in over your head." *Id.* at 115. Several weeks after the petitions were denied, Mississippi Governor Ross Barnett inadvertently strengthened Kunstler's commitment to the cause of defending minorities and railing against injustice. Barnett asked Kunstler why he became "mixed up with these troublemakers," and whether Kunstler had any children. When Kunstler replied that he had two daughters, the Governor of Mississippi asked, "What would you think if your daughter married a dirty, kinky-headed, field-hand nigger?" *Id.* at 104.

10. 28 U.S.C. § 1443 (1964). The statute provided in pertinent part as follows:  
Civil rights cases.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against the person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

*Id.*

11. A RADICAL LAWYER, *supra* note 2, at 105. The federal removal statute became a staple of civil rights litigation until 1965 when its scope was severely limited by the Supreme Court. In *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), the Court held that removal to federal court was only proper "in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." *Id.* at 827-28.

12. A RADICAL LAWYER, *supra* note 2, at 108.

There, Kunstler met Dr. King who asked him to serve as his special trial counsel. At first Kunstler hesitated. However, after listening to Dr. King speak and falling under Dr. King's oratorical spell, Kunstler accepted.<sup>13</sup> He served Dr. King in this capacity until King's murder in 1968.

Not content to merely represent people in the trenches, Kunstler frequently jumped in alongside his clients.<sup>14</sup> In the spring of 1963, Dr. King initiated civil rights protests in Birmingham, Alabama — considered by many to be the most segregated city in the South. When Dr. King's younger brother, A.D., was arrested, Dr. King dispatched Kunstler to free him. During this trip, Kunstler for the first time — but hardly the last — crossed the line between client representation and client collaboration.<sup>15</sup> More than thirty years later, Kunstler recalled:

It was during the Birmingham protests that, for the first time, I did more than lawyering. One day, walking from the courthouse, I joined a group of marchers. We talked for hours, with our signs held high, singing movement songs, joined in spirit.

I felt revived and renewed. Although I worked on a proposed lawsuit against the city and suggested using the federal removal statute to get more people released from jail, I spent most of my time during the spring of 1963 marching in the streets of

13. Dr. King's speech proved to be enormously important to Kunstler's ultimate decision to dedicate himself fulltime to civil rights work. In Kunstler's words:

Martin's speech was a revelation. It took away all my doubts. Suddenly, I knew that the civil rights movement would transcend all obstacles and succeed. He was absolutely electrifying, but it was not the words alone, although his imagery was pure poetry. It was the combination of words and voice, the poetry and the music.

*Id.* at 109.

That Dr. King's tremendous oratorical gifts would deeply impress Kunstler makes perfect sense, given that Kunstler studied French and wrote love sonnets as an undergraduate at Yale University. *MOUTHPIECE*, *supra* note 4, at 7. In 1940, Kunstler co-authored a collection of 40 sonnets, *Our Pleasant Vices*. He became poet laureate for *Amsterdam News*, a black weekly published in New York City. Kunstler published two other books of poetry and commentary, *Trials and Tribulations* (1985) and *Hints and Allegations* (1994).

14. David Stout, *William Kunstler, 76, Dies; Lawyer for Social Outcasts*, N.Y. TIMES, Sept. 5, 1995, at B6.

15. During perhaps his best-known case, the trial of the Chicago 7, Kunstler, in open court, mischievously alluded to his willingness to join clients in unlawful activities. Along with six others, Abbie Hoffman had been charged with conspiring to incite riots designed to interrupt the 1968 Democratic National Convention in Chicago. While the trial was underway, Hoffman received through the mail a package containing a dried green leafy substance, which appeared to be marijuana. Kunstler informed the judge, prompting the following exchange:

JUDGE: I'm sure counsel can find a way to take care of this matter without further troubling the court.

KUNSTLER: Your honor, I will personally see that it is burned this evening.

*Id.* at B6. For more about the trial of the Chicago 7, see *infra* notes 17-22 and accompanying text.

Birmingham. I realized that the paperwork and intellectual maneuvers in the courtroom were not the heart of the movement at all, but merely an appendage. Marching and protesting, being out on the streets — that was where the strength of the movement lay, and that would be how it would finally prevail.<sup>16</sup>

If any single case brought Kunstler national recognition it was his trial representation of the Chicago 7, a scruffy group of white Americans charged, *inter alia*, with conspiring to incite riots in order to wreak havoc during the 1968 Democratic National Convention.<sup>17</sup> The relationship between Kunstler and trial judge Julius J. Hoffman quickly turned disputatious and courtroom decorum was promptly jettisoned.<sup>18</sup> Aided and abetted by Kunstler and co-counsel Len Weinglass, the defendants openly mocked the judge by wearing judicial robes and munching jellybeans in the courtroom.

After five days of deliberations, the jury acquitted all defendants of the most serious charge: conspiracy to incite a riot. Two defendants, John Froines and Lee Weiner, were acquitted of all criminal charges. The remaining five defendants were each convicted of a single charge: intending to organize, promote and incite a riot.<sup>19</sup> However, while the jury deliberated, Judge Hoffman charged all seven defendants, and their attorneys, with contempt. Judge Hoffman singled out Kunstler for the harshest treatment. He charged Kunstler with twenty-four counts of contempt, pronounced him guilty and sentenced him to four years and thirteen days.<sup>20</sup>

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16. A RADICAL LAWYER, *supra* note 2, at 126. This, however, was far from Kunstler's first overt act of civil disobedience. Just the year before, Kunstler barely avoided arrest when he insisted on playing tennis with a black minister on a whites-only tennis court in Albany, Georgia. Stout, *supra* note 14, at B6.

17. Transcript of Grand Jury Proceedings, United States v. Dellinger, No. 69 CR-180 (N.D. Ill. Feb. 14-15, 1970), in JUDY CLAVIR & JOHN SPITZER, THE CONSPIRACY TRIAL (1970). Originally, there were eight defendants, jointly charged: Rennie Davis, David Dellinger, John R. Froines, Tom Hayden, Abbie Hoffman, Jerry Rubin, Bobby Seale and Lee Weiner. Seale, a Black Panther, had his case severed and the remaining defendants became known as the Chicago 7.

18. For a far more complete account of the trial and the shenanigans of the defendants, see CLAVIR & SPITZER, *supra* note 17; see also JOHN SCHULTZ, MOTION WILL BE DENIED: A NEW REPORT ON THE CHICAGO CONSPIRACY TRIAL (1972); JASON EPSTEIN, THE GREAT CONSPIRACY TRIAL: AN ESSAY ON LAW, LIBERTY, AND THE CONSTITUTION (1970).

19. Indictment, United States v. Dellinger, No. 69 CR-180 (N.D. Ill. Sept. 1968), in CLAVIR & SPITZER, *supra* note 17, at 601-06.

20. See CLAVIR & SPITZER, *supra* note 17, at 579-82 & app. IV. Indeed, review of the trial transcripts suggests that Kunstler purposefully provoked the judge into holding him in contempt. For example, after Judge Hoffman had cited defendant Dave Dellinger for contempt, Kunstler exploded: "Do me too. I don't want to be left out." David Stout, *May it Displease the Court: Quotations of a Radical Lawyer*, N.Y. TIMES, Sept. 10, 1995, § 4. The judge obliged. Earlier during the trial, before Bobby Seale was severed, Judge Hoffman ordered the marshals to gag and shackle Seale. Kunstler objected: "Your honor, are we going to stop this medieval torture? This is no longer a court of order . . . this is an unholy disgrace to the law that is going on in this courtroom, and I as an American lawyer feel a disgrace." A RADICAL LAWYER, *supra* note

Ultimately, a federal court of appeals overturned Kunstler's contempt convictions and he avoided prison.<sup>21</sup>

The highly politicized Chicago 7 trial, with its irreverent antics and attendant publicity, brought Kunstler fame and notoriety.<sup>22</sup> It also brought Kunstler a clientele which included, in the words of USA Today reporter Tony Mauro, "some of this century's best-known terrorists, scoundrels, underdogs and martyrs."<sup>23</sup> Those Kunstler would represent during the next thirty-five years — and the charges they faced — sketch a remarkable outline of the major political and social issues which deeply divided America during Kunstler's adult lifetime. Consider the following sample of Kunstler clients and the legal entanglements which brought them to his door:<sup>24</sup>

Poet Dylan Thomas — Kunstler represented Thomas in an employment dispute with Smith College. The College sought to withhold Thomas' speaking fee after he was accused of groping a Smith College student. Kunstler persuaded the President of Smith College to pay Thomas \$400 of the \$500 fee.<sup>25</sup>

Stand-up comedian and political satirist Lenny Bruce — Kunstler represented Bruce on appeal from his various obscenity convictions.<sup>26</sup>

2, at 31.

Kunstler would later joke, "I've been held in so many contempt situations that I've lost count." William M. Kunstler, *Crusader for Justice: Decades on the Front Line*, Remarks at the University of Oklahoma (Apr. 7, 1995) (videotape on file with the *American Indian Law Review*).

21. *In re Dellinger*, 370 F. Supp. 1304 (N.D. Ill. 1973), *aff'd*, 502 F.2d 813 (7th Cir. 1974), *cert. denied* 420 U.S. 990 (1975).

22. According to Kunstler, the trial, which lasted nearly five months, was his "personal Rubicon." A RADICAL LAWYER, *supra* note 2, at 42.

23. Tony Mauro, *Lawyer Kunstler Dead at Age 76*, USA TODAY, Sept. 5, 1995, at 3A.

24. Other famous Kunstler clients and causes included Catholic anti-war protesters, Daniel and Philip Berrigan; Marlon Brando's son, Christian, who faced charges of murdering his sister's lover; Joseph "Joe Bananas" Bonanno, reputed head of the Bonanno organized crime family in New York; Robert Nelson Drew, a Texas death row inmate whose execution order was signed and accompanied by a "happy face" drawing; federal judge Alcee Hastings, who faced impeachment proceedings; Adam Clayton Powell, who in 1966 sought reinstatement to the U.S. House of Representatives; and Yusef Salaam, a young man convicted of the beating and rape of a Central Park jogger.

Perhaps Kunstler's most heralded — and despised — legal triumph was *Texas v. Johnson*, 491 U.S. 397 (1989), a case Kunstler personally argued in the United States Supreme Court. Johnson had burned a United States flag to protest the policies and government of Ronald Reagan and had been convicted under a Texas statute which made it a crime to burn "venerable objects." *Johnson*, 491 U.S. at 400. In a 5-4 decision, the Supreme Court struck down the Texas law as a violation of the First Amendment guarantee of free speech.

When Congress reflexively passed a federal statute making it a crime to burn a flag, Kunstler again challenged the law before the high Court and prevailed, 5-4. *See United States v. Eichman*, 496 U.S. 310 (1990).

25. A RADICAL LAWYER, *supra* note 2, at 69.

26. *Id.* at 167-70. In his memoir, Kunstler reveals that he injected heroin with Bruce in the men's room at his law office on Christmas Eve, 1965. Eight months later, Bruce lay dead of an

Qubilah Shabazz, daughter of slain Black Muslim leader Malcolm X — During the last year of his life, Kunstler represented Shabazz, the daughter of Kunstler's old friend, Malcolm X.<sup>27</sup> Shabazz had confessed to attempting to solicit the murder of Nation of Islam leader Louis Farrakhan. According to the prosecution, Shabazz believed Farrakhan was responsible for her father's murder in February 1965. Kunstler claimed that Shabazz had been entrapped by the government and negotiated a remarkable settlement on her behalf. All charges against Shabazz were dropped on condition that she undergo psychological treatment and enter a drug dependency program.<sup>28</sup>

Reputed Mafia don John Gotti — When the United States government successfully moved to have Gotti's personal lawyer disqualified from defending Gotti against racketeering charges, Kunstler filed a civil rights action on Gotti's behalf, alleging a violation of Gotti's Sixth Amendment rights.<sup>29</sup>

Daryl Cabey, victim of subway vigilante Bernhard Goetz — Along with law partner Ron Kuby, Kunstler filed suit against Goetz seeking \$50 million for personal injuries caused when Goetz shot Cabey on the New York City subway, leaving him paralyzed for life.<sup>30</sup>

El Sayyid Nosair, accused assassin of Rabbi Meir Kahane — Despite several eyewitnesses who testified that they saw Egyptian immigrant El Sayyid Nosair shoot the militant founder of the Jewish Defense League, Kunstler secured an acquittal based on reasonable doubt.<sup>31</sup>

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overdose, his arms wrapped around a toilet. *Id.* at 168. Less than a month before his own death, Kunstler performed a stand-up routine at Caroline's Comedy Club in New York. In typical self-deprecating humor, Kunstler asked, "What's the difference between a lawyer and a spermatozoa? The spermatozoa has one chance in 6 million to become a human being." *Asides*, PITTSBURGH POST-GAZETTE, Aug. 13, 1995, at E2.

27. Kunstler's resume proudly recites an acting credit for Spike Lee's film, *Malcolm X*. See Resume of William M. Kunstler, Attorney at Law (on file with the *American Indian Law Review*). Kunstler's cameo appearance required him to play a racist judge who sentenced a young Malcolm X (portrayed by Denzel Washington) to prison. Kunstler undoubtedly relished the celebrity of appearing in a major motion picture, but was likely more than a little uncomfortable cast as a patrician judge. See A RADICAL LAWYER, *supra* note 2, at 401.

28. Qubilah Shabazz, *Accused of Hiring Hitman to Assassinate Louis Farrakhan, Agrees to Undergo Drug and Psychiatric Treatment* (NBC Nightly News, May 1, 1995), available on Westlaw, 1995 WL 8689664.

29. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions the accused shall . . . have the assistance of counsel for his defence." U.S. CONST. amend. VI. Kunstler once said of Gotti, "I cannot regard someone like John Gotti as more evil than someone in George Bush's position." *May It Displease the Court*, *supra* note 20, § 4.

30. A RADICAL LAWYER, *supra* note 2, at 292-93.

31. Kunstler later observed that his representation of Nosair brought him "the most personal and professional trouble." Kahane supporters threatened Kunstler with death, sent him hate mail, and picketed his home. *Id.* at 318-24. Nosair was eventually retried for Kahane's murder in federal court and received a life sentence.



Jack Ruby, the convicted murderer of presidential assassin Lee Harvey Oswald — As a member of Ruby's team of appellate lawyers, Kunstler sought to overturn Ruby's conviction and death sentence.<sup>32</sup>

Wayne Williams, the alleged Atlanta child murderer — In 1985, Kunstler became convinced that Williams, suspected of killing as many as twenty-seven black children, was innocent.<sup>33</sup> Kunstler helped file post-conviction pleadings for Williams and died hoping that Williams would one day be vindicated.<sup>34</sup>

Marion Barry, the Mayor of the District of Columbia — Based in no small part on a videotape which showed him smoking crack cocaine in the company of a former girlfriend, Barry had been convicted of cocaine possession. Because Barry was an old friend, and because Kunstler was convinced that Barry had been entrapped by the FBI, Kunstler agreed to represent Barry on appeal.<sup>35</sup>

One could search in vain for a cogent thread linking the many clients and causes Kunstler chose to associate with, both personally and professionally. The task is made easier by considering clues provided by Kunstler himself. On several occasions, Kunstler attempted to explain his representation of such a diverse group of pariahs and social outcasts. He said, "I only defend those whose goals I share. I'm not a lawyer for hire. I only defend those I love."<sup>36</sup> And, in defending these disparate soulmates, Kunstler frequently resorted to a unifying defense theory: "The government is always the main enemy. I believe that government is evil. My role is always to fight it. Always be the burr under the saddle."<sup>37</sup>

Kunstler's midlife epiphany — that "government is evil" — is nowhere more vividly demonstrated than in the shameful, even criminal, treatment of Native Americans by the United States government throughout history. Thus, it should surprise no one that Kunstler's empathy with and devotion to his clients were never deeper than when he represented Native Americans.<sup>38</sup>

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32. *Id.* at 154-60.

33. Williams was actually only tried for — and convicted of — the murders of two young black men.

34. A RADICAL LAWYER, *supra* note 2, at 296.

35. *Id.* at 309-11. Kunstler had known Barry since Barry served as a young field secretary for the Student Nonviolent Coordinating Committee in Jackson, Mississippi. Kunstler explained, "My strong sense of loyalty almost always guarantees that I will represent these old friends when they need a lawyer." *Id.* at 309-10.

36. Mauro, *supra* note 23, at 3A.

37. *Defending the Despised*, *supra* note 2, at 225. Kunstler reiterated his total distrust of government during his last appearance at the University of Oklahoma. He said, "The idea now is to get rid of the lawyers [the government doesn't] like: the aggressive lawyers, the ones who regard the system, as I do, as being totally corrupt." Crusader for Justice: Decades on the Front Line, *supra* note 20.

38. In addition to the cases and clients described below, Kunstler represented many other Native Americans, some infamous, some obscure. For example, Kunstler represented at trial

*The Occupation of Wounded Knee*

Much of Kunstler's work on behalf of Native Americans flowed from events which transpired nearly thirty years before he was born. Shortly after Christmas in 1890, a notorious massacre at Wounded Knee, South Dakota marked the end of the era of the Indian wars. Historian Kenneth C. Davis summarized the Wounded Knee massacre as follows:

In 1888 a Paiute Indian named Wovoka spawned a religious movement called the Ghost Dance. Ghost Dancers believed that the world would soon end and that the Indians, including the dead of the past, would inherit the earth. Wovoka preached harmony among Indians and rejection of all things white, especially alcohol. The religion took its name from a ritual in which the frenzied dancers would glimpse this future Indian paradise.

The religion quickly took hold and was widely adopted by Indians throughout the Plains, the Southwest, and the Far West. But it took on new importance when two Sioux medicine men claimed that "ghost shirts" worn by the dancers could stop white men's bullets, leading to a new militant fervor among some Indians.

Alarmed by the Ghost Dancers, the [United States] army attempted to arrest a number of Indian leaders, including the great chief Sitting Bull, who was then on a reservation. Like

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Sergeant Clayton F. Lonetree, a Marine who allegedly passed secrets to the Russians while assigned to guard duty at the American Embassy in Moscow. Lonetree's initial sentence was 30 years, but it was eventually reduced to 15 years. At the time of his death, Kunstler continued to work for Lonetree's freedom. WILLIAM M. KUNSTLER, *HINTS AND ALLEGATIONS* 120 (1994). For a sonnet Kunstler wrote about the Lonetree case, see *id.* at 121.

Less well known was Kunstler's representation of Rita Silk Nauni, an Indian woman who fled a confrontation with her abusive husband in Los Angeles and returned to Oklahoma City with her young son. Lacking taxi fare, Nauni and her child began walking away from the airport when two officers approached them. Nauni panicked, convinced that the officers intended to take her child from her. She ripped the female officer's gun from her holster and shot and killed the male officer. Nauni faced the prospect of death by electrocution. The Center for Constitutional Rights, which Kunstler helped found, became involved in the case and, miraculously, Nauni was released from prison.

Kunstler's sole appearance in the case, before a cantankerous judge in Oklahoma City, earned him a contempt citation and a three-day stay in the Oklahoma County Jail. A RADICAL LAWYER, *supra* note 2, at 258. In 1995, Kunstler reminisced about his stay in the Oklahoma County Jail:

But I did get my teeth cleaned, which I always do if I'm in the pokey long enough. The reason I have kept all my teeth these 76 years has been from jailhouse dentists. The reason I can still pee regularly is because of the urologists in most of the jails.

Crusader for Justice: Decades on the Front Line, *supra* note 20.

Crazy Horse, Sitting Bull was killed during the fight to capture him. Another chief named Big Foot, also sought by the army, was ill with pneumonia and wanted peace. But three days after Christmas Day in 1890, his band of some 350 women, children, and men was intercepted by an army patrol and taken to an encampment at Wounded Knee, South Dakota. As the Indians were surrendering their weapons to the soldiers, the gun of a deaf Indian named Black Coyote discharged. Whether it was an accident or deliberate is uncertain. But the soldiers immediately turned their guns and artillery pieces on the disarmed Indians. At least 150 Indians, and probably as many as 300, died in the barrage. Wounded Knee was the Indians' "last stand."<sup>39</sup>

During the winter of 1972-73, under the direction of the American Indian Movement (AIM),<sup>40</sup> hundreds of Oglala Sioux, along with Native Americans representing other tribes and nations, converged on Wounded Knee. In addition to commemorating the 1890 massacre, the group sought to publicize the scandalous deprivations confronting reservation-bound Native Americans throughout the country. Native Americans endured abject poverty, squalor, unsanitary conditions, severe unemployment, and alarming rates of alcohol and substance abuse.

Because the historic hamlet of Wounded Knee is located on the Pine Ridge Reservation, the demonstration proved particularly volatile. In addition to the devastating, unhealed wounds inflicted on Native Americans in 1890, modern atrocities were commonplace at the Pine Ridge Reservation during the 1970s. Tension escalated as several murders of Native Americans went unsolved<sup>41</sup> and whites and Native Americans skirmished at the nearby Custer County Courthouse.<sup>42</sup>

Adding to the malaise, many reservation residents were unhappy with the governance of Dick Wilson, a tribal leader selected by the Bureau of Indian

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39. KENNETH C. DAVIS, *DON'T KNOW MUCH ABOUT HISTORY* 195-96 (1990). For a moving account of the systematic destruction of the American Indian during the second half of the nineteenth century, see DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* (1970).

40. A group of Native American leaders founded AIM in 1968 to improve the impoverished lives of Native Americans. AIM organized a series of dramatic demonstrations including the 1969 occupation of the former federal prison at Alcatraz Island, San Francisco, and the siege of the Bureau of Indian Affairs building in Washington, D.C. in 1972. A *RADICAL LAWYER*, *supra* note 2, at 234.

41. Between 1973 and 1976, 63 violent deaths were documented on the Pine Ridge Reservation. This accounted for an annual murder rate of 170 per 100,000, by far the highest in the nation. This equates with more than eight times the 1974 murder rate in Detroit, the nation's urban leader. One author calculated the murder rate on the Pine Ridge Reservation to be "quite close to that in Chile in the early days of Pinochet." JIM MESSERSCHMIDT, *THE TRIAL OF LEONARD PELTIER* 6, 181 n.25 (1983).

42. A *RADICAL LAWYER*, *supra* note 2, at 237.

Affairs (BIA). Wilson organized a fascist police force — Guardians of the Oglala Nation — which roamed the reservation purporting to preserve order. Wilson's opponents labelled his police force the "goon squad" and charged Wilson with using Gestapo tactics against his own people.<sup>43</sup>

The Oglala Sioux Civil Rights Organization had invited leaders of AIM onto the reservation to protest Wilson's reign of terror and to focus national attention on the U.S. government's treatment of Native Americans. For seventy-one days, AIM members occupied Wounded Knee, refusing to permit anyone not affiliated with AIM in or out of the village.<sup>44</sup>

In response, the government surrounded Wounded Knee with FBI agents, federal marshals, state troopers, BIA police and heavily armed military troops.<sup>45</sup> Kunstler acted as a chief negotiator for AIM, and counselled against ending the siege early.

On May 6, 1973, the occupation ended after government representatives agreed to conduct congressional investigations and hold meetings on the conditions at Pine Ridge and alleged violations of the Fort Laramie Treaty of 1868.<sup>46</sup> The government honored none of the Indian demands<sup>47</sup> and indicted several hundred Native Americans on federal charges. Kunstler joined the trial team representing Russell Means, an AIM leader charged with conspiracy to illegally occupy Wounded Knee and other federal offenses.<sup>48</sup>

The trial of Means and fellow AIM comrade Dennis Banks lasted nearly nine months.<sup>49</sup> A row between federal marshals and AIM members erupted when Judge Fred Nichol heard a spectator laugh and ordered the removal of Native American observers from the courtroom. Kunstler rushed to the bench, screamed at the judge that he should have held a hearing, and was jailed for his vehement advocacy.<sup>50</sup>

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43. *Id.*

44. *Id.* at 238.

45. *Id.* at 237.

46. Treaty with the Sioux and Arapaho (Treaty of Fort Laramie), Apr. 29, 1868, 15 Stat. 635, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES 998 (Charles J. Kappler ed., photo. reprint 1975) (1904). Under this treaty, the government agreed to recognize the Sioux as a sovereign nation and to provide the Sioux with 50 million acres of traditional homeland in Nebraska, North Dakota, South Dakota, Montana and Wyoming. After gold, uranium, coal and oil were discovered on these lands, the government reneged on the promises it had made under the treaty. LENNOX S. HINDS, ILLUSIONS OF JUSTICE: HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES 270-71 (1978).

47. Other demands which the government ignored included an in-depth probe of the Bureau of Indian Affairs, and a grand jury investigation of Dick Wilson and his goon squad for crimes allegedly committed against Native Americans. A RADICAL LAWYER, *supra* note 2, at 238.

48. *Id.* at 242.

49. If convicted, Means and Russell each faced a possible prison sentence of 85 years. MESSERSCHMIDT, *supra* note 41, at 23.

50. A RADICAL LAWYER, *supra* note 2, at 244.

At the suggestion of a friend, Kunstler chose to end his closing argument with a fragment of a poem by Stephen Vincent Benet, an expatriate who renounced his allegiance to the United States because of the barbaric treatment of Native Americans. Kunstler read:

*I shall not rest quiet in Montparnasse.  
I shall not lie easy at Winchelsea.  
You may bury my body at Sussex grass.  
You may bury my tongue at Champmedy.  
I shall not be there. I shall rise and pass.  
Bury my heart at Wounded Knee.*<sup>51</sup>

The defense moved for a dismissal of the charges because of prosecutorial and FBI misconduct. Specifically, the defense alleged (1) a conspiracy to commit perjury and to cover up the subornation of perjury of a last-minute prosecution witness; (2) suppression of an FBI statement which would have exposed the perjury of another prosecution witness; and (3) the unconstitutional use of military personnel and equipment at Wounded Knee, and a government attempt to cover up this illegality.<sup>52</sup>

Jury deliberations ceased when a juror became ill and the government refused to accept a verdict of eleven jurors. Rather than declare a mistrial, the judge angrily granted the defense motion to dismiss the charges against Means and Banks. This time Judge Nichol's ire was reserved for the government. For more than an hour, Judge Nichol chastised the lead prosecutor, R.D. Hurd, for being "more interested in convictions than in justice."<sup>53</sup> He seethed:

I am forced to conclude that the prosecution acted in bad faith at various times throughout the course of the trial and was seeking convictions at the expense of justice. . . . The fact that incidents of misconduct formed a pattern throughout the course of the trial leads me to the belief that this case was not prosecuted in good faith or in the spirit of justice. The waters of justice have been polluted, and dismissal, I believe, is the appropriate cure for the pollution in this case.<sup>54</sup>

Judge Nichol was particularly critical of the FBI. He said, "It's hard for me to believe that the FBI, which I have revered for so long, has stooped so low."<sup>55</sup>

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51. The stanzas quoted are from "American Names," by Stephen Vincent Benet. See STEPHEN VINCENT BENET, *SELECTED WORKS OF STEPHEN VINCENT BENET* (1942).

52. MESSERSCHMIDT, *supra* note 41, at 23-24.

53. PETER MATTHIESSEN, *IN THE SPIRIT OF CRAZY HORSE* 98 (2d ed. 1991).

54. *Id.*

55. *Id.* Ten jurors were so repulsed by the government's tactics that they sent a letter to

*The Pine Ridge Reservation Murders*

Conditions at the Pine Ridge Reservation did not improve in the years following the occupation of Wounded Knee. Scores of Native Americans were murdered on the reservation between 1973 and 1975 and government oppression persisted. The political struggle intensified. Certain reservation members supported the structure of tribal government while others advocated a different form of government. To alleviate the conflict, tribal leaders invited AIM members to stay on the reservation and several did so.<sup>56</sup>

Hell broke loose on June 26, 1975. That day, two FBI agents and a Native American were killed in a bloody shootout on the reservation. FBI Agents Jack Coler and Ronald Williams were investigating four individuals who had been charged with armed robbery and assault with a deadly weapon.<sup>57</sup> Coler and Williams ostensibly entered the reservation to serve an arrest warrant for James Theodore Eagle, a young man wanted for the theft of cowboy boots.<sup>58</sup> Driving separate, unmarked cars, the agents followed a van carrying three people into the Jumping Bull compound on the reservation.<sup>59</sup> A gunfight erupted between the agents and occupants of the van.<sup>60</sup> Soon, AIM members from the Jumping Bull compound joined in the shooting.

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Attorney General William B. Saxbe asking that the government not appeal the dismissal and that the government dismiss charges against 90 others awaiting prosecution for their part in the occupation. MESSERSCHMIDT, *supra* note 41, at 24-25.

The depth's of the FBI's decline could not be fully appreciated until some time after trial, when it was revealed that the FBI and government prosecutors had placed an informer inside the defense team. During the trial, while under oath, Joseph Trimbach, Special Agent in Charge of Minnesota, North Dakota and South Dakota, had expressly *denied* infiltrating the defense team. *Id.*; see also *Revolutionary Activities Within the United States: The American Indian Movement, Before the Senate Subcomm. on Internal Security*, 94th Cong., 2d Sess. 61 (1976) (statement of government informant and AIM security chief Douglas Durham); John Kifner, *Security Chief for Militant Indian Group Says He Was Paid Informer for FBI*, N.Y. TIMES, Mar. 31, 1975, at 31.

56. AIM members arrived on the reservation in the spring of 1975 and stayed in an encampment known as Tent City. Included in this group were Leonard Peltier, Darrell Butler, Robert Robideau, Michael Anderson, Wilford Draper, Norman Charles, Norman Brown, and Joe Stuntz. *United States v. Peltier*, 585 F.2d 314, 318 (8th Cir. 1978).

The cause of much of the political unrest, Dick Wilson, was not on the reservation when the murders occurred. He was in Washington, D.C., discussing the possibility of signing over to the Department of the Interior one-eighth of the reservation, the Sheep Mountain Gunnery Range. A U.S. geological survey had discovered deposits of oil, gas, uranium ore and gravel on this land. MESSERSCHMIDT, *supra* note 41, at 29.

57. *Peltier*, 585 F.2d at 318.

58. Joan Cheever, *Conviction of Convenience?*, NAT'L L.J., June 25, 1990, at 28.

59. *Peltier*, 585 F.2d at 318.

60. To this day, it remains unclear which side shot first. Cheever, *supra* note 58, at 28.

Little Joe Stuntz, a Lakota AIM member, and Federal Agents Coler and Williams died in the gun battle.<sup>61</sup> Although both agents had been wounded by bullets fired from a distance, the fatal shots were inflicted at point blank range.<sup>62</sup>

Five months later, four Native Americans — Robert Robideau, Darrell Butler, Jimmy Eagle and Leonard Peltier — were indicted for the murders of Agents Coler and Williams.<sup>63</sup> The government ultimately dismissed the charges against Eagle, the youngest defendant, and Peltier fled to Canada. When Robideau and Butler were tried jointly for aiding and abetting the murder of the agents, Kunstler agreed to help represent them.<sup>64</sup>

### *The Cedar Rapids Trial*

Anti-Indian prejudice forced the transfer of the trial from South Dakota to Cedar Rapids, Iowa. Even there, Kunstler claimed, the FBI sought to turn public sentiment against the defendants by spreading rumors that AIM members planned a murderous rampage during which a police officer would be killed each day.<sup>65</sup>

In more civilized competitions, it has been observed that "[t]he best offense is a good defense."<sup>66</sup> Kunstler's representation of Robideau and Butler proved a variant strategy to be true: the best defense may well be a good offense. By focusing on the covert actions and subversions of the FBI, Kunstler successfully deflected attention from his clients, and seriously undermined the government's case. Kunstler's thesis was at once blunt and courageous: the FBI had acted recklessly and immorally, and had caused the deaths of its own agents.<sup>67</sup> Through cross-examination, Kunstler suggested that the FBI suborned perjury and coerced witnesses into reciting the Bureau's version of events on the stand. Moreover, Kunstler haled into court as key defense witnesses prominent government officials, including Senator Frank Church, chair of the Senate's Select Committee to Study Governmental Operations with Respect to Intelligence Activities (COINTELPRO), and Clarence Kelley, Director of the FBI.<sup>68</sup>

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61. MESSERSCHMIDT, *supra* note 41, at 29-30. Charges were never brought in connection with Stuntz's death. The government's position was simply that Stuntz had been killed by law enforcement personnel lawfully performing their official duties. *Id.* at 30.

62. More than 125 bullets riddled the agents' cars. *Peltier*, 585 F.2d at 318-19.

63. The indictments were returned against the four defendants on November 25, 1975. Cheever, *supra* note 58, at 28.

64. Other lawyers on the defense team included John C. Lowe, Bruce Ellison, Jack Schwartz and Kunstler's wife, Margaret Ratner. A RADICAL LAWYER, *supra* note 2, at 248.

65. *Id.* at 248-49.

66. This remark has been attributed to football coaching legend Vince Lombardi.

67. A RADICAL LAWYER, *supra* note 2, at 249.

68. *Id.* at 249-50. Kelley thus became the first director of the FBI to serve as a witness in a criminal trial. MATTHIESSEN, *supra* note 53, at 306.

Through Senator Church, Kunstler established that the FBI had deliberately spread misinformation about certain lawful organizations, including AIM. Director Kelley's testimony was even more dramatic. Kunstler showed Kelley cablegrams and telegrams sent from Washington, D.C., under Kelley's name, to all state and federal law enforcement officers throughout South Dakota. These documents warned that AIM members planned to fake highway accidents throughout South Dakota. Officers responding to the emergency calls would be ambushed by AIM members lying in wait. Kelley denied that he either saw or sent these messages. Somewhat incredibly, Kelley testified that AIM was a perfectly legitimate civil rights organization which enjoyed the express approval of the FBI.<sup>69</sup>

During his direct examination, Kunstler so rattled Kelley that Kelley lost his composure and bolstered the defendants' claim of self-defense. Kunstler baited Kelley by suggesting that the FBI search on the Pine Ridge Reservation was for all practical purposes a paramilitary operation.

KUNSTLER: What I'm trying to refer to is that agents, and there has been testimony in the record, agents on the Pine Ridge Reservation have, among other things, M-16s, automatic weapons, they have bullet proof vests, there are Army type clothes issued, jackets and so on. That is somewhat different than agents normally have in, say, Cedar Rapids, or New York or Chicago, isn't it?

KELLEY: Yes. That is different.

KUNSTLER: And that is due . . . to the fact the reservation is essentially considered to be more dangerous than Cedar Rapids, Iowa?

KELLEY: More dangerous perhaps to FBI agents, two of whom have been slain.

KUNSTLER: Hundreds of Native Americans have been slain, too, haven't they?

KELLEY: There have been many Americans slain but two FBI agents were slain, too, and I think they have reason to be really concerned about their own lives!

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69. Additionally, Kelley denied subscribing to Civil War General Philip H. Sheridan's credo, "The only good Indians I ever saw were dead." A RADICAL LAWYER, *supra* note 2, at 250.



KUNSTLER: One of the reasons for equipping them this way is that there is a fear that strangers who come into isolated areas on the Pine Ridge Indian Reservation who are not known to the people there, might themselves come under attack out of fear. Isn't that correct?

KELLEY: *I don't care who it is that comes in! If they are threatened they have the right to protect themselves!*

Director Kelley was excused without further questioning.<sup>70</sup>

Five days into deliberations,<sup>71</sup> the jury acquitted both defendants and Kunstler rejoiced.<sup>72</sup> Four days later, an internal FBI directive ordered agents to specifically analyze the reasons "why the [jury] found Robideau and Butler not guilty."<sup>73</sup> Unwilling to let the deaths of two agents go unavenged, the Bureau concentrated its efforts on locating, arresting and gathering evidence against Leonard Peltier.<sup>74</sup>

Although Kunstler did not represent Peltier at trial, he joined Peltier's appellate team and became an impassioned advocate for Peltier's release. The circumstances surrounding Peltier's trial and conviction illuminate why Kunstler felt so strongly that Peltier was a political prisoner who had been wrongfully accused and unjustly convicted.

On February 6, 1976, Leonard Peltier was arrested in Canada.<sup>75</sup> Peltier was extradited after the FBI obtained three affidavits from Myrtle Poor Bear, a Lakota woman who claimed to be Peltier's girlfriend and implicated him in the Pine Ridge murders.<sup>76</sup> Nine years later, government attorneys

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70. MATTHIESSEN, *supra* note 53, at 307-08.

71. Robideau and Butler received word from a young medicine man that, if there were four thunderstorms while the jury deliberated, they would be acquitted. The day the jury began deliberating, it stormed. On the eve of the verdict, it stormed a third time. Early on the morning of the final day of deliberations, it stormed for a fourth time. Dino Butler entered the courtroom that day supremely confident that he and Robideau would be exonerated. *Id.* at 312.

72. Kunstler's autobiography reveals that FBI agents "sobbed in frustration" when the verdicts were announced. Kunstler was unmoved and savored their anguish. He wrote, "I was glad they could feel what it was like to fight and lose. I thought, for once you're on the receiving end." A RADICAL LAWYER, *supra* note 2, at 251. According to Peter Matthiessen, Kunstler "was astounded by the 'historic' decision [and] prais[ed] Judge McManus for 'a mystical standard of fairness.'" MATTHIESSEN, *supra* note 53, at 312.

73. Cheever, *supra* note 58, at 31.

74. Indeed, because the government ultimately stipulated that Jimmy Eagle was not on the reservation during the gun battle, the acquittals of Robideau and Butler left Peltier as the only indicted suspect triable for the murders. MESSERSCHMIDT, *supra* note 41, at 38.

75. Cheever, *supra* note 58, at 2.

76. MESSERSCHMIDT, *supra* note 41, at 32-34.

would admit that Poor Bear's affidavits — the only testimonial evidence directly linking Peltier to the murders — had been fabricated.<sup>77</sup>

### *The Fargo Trial*

Unlike Robideau and Butler, who successfully argued for a change of venue outside the Dakotas, Peltier was tried in Fargo, North Dakota. Nonetheless, Kunstler and the Butler-Robideau defense team

had uncovered much FBI misconduct, such as tampering with witnesses and evidence, perjury, COINTELPRO-type activities used against AIM, substantial evidence indicating there was a full scale paramilitary assault on Pine Ridge by the FBI and other law enforcement officials on the day in question. The jury as a result concluded that Butler and Robideau were acting in self defense.

Peltier's defense team had this same evidence, and, in fact, more which strongly indicated FBI misconduct in their preparation for the trial of Leonard Peltier.<sup>78</sup>

Why, then, was Peltier convicted, after Butler and Robideau had been acquitted? Kunstler, busy with another murder trial, was unable to represent Peltier.<sup>79</sup> Nonetheless, it would be simplistic, and largely inaccurate, to conclude that Kunstler's absence from the Peltier trial team was determinative. Jim Messerschmidt, an ardent supporter of Leonard Peltier, chronicled key differences between the two proceedings which help explain the disparate verdicts.<sup>80</sup>

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77. Cheever, *supra* note 58, at 29. During the same period Poor Bear signed affidavits implicating Peltier, she also signed affidavits saying that she was the girlfriend of murder suspect Richard Marshall, and that he had twice confessed to her that he had murdered Martin Montileaux. Poor Bear later explained that FBI agents had threatened to kill her and her daughters if she did not cooperate. MESSERSCHMIDT, *supra* note 41, at 34.

Poor Bear's fear of violent death was well-founded. Anna Mae Aquash, an AIM activist who had been arrested for illegal weapons possession, was accused of involvement in the Williams and Coler murders. When agents demanded to know who else was involved, Aquash replied, "You can either shoot me or throw me in jail." David Weir and Lowell Bergman, *The Killing of Anna Mae Aquash*, ROLLING STONE, Apr. 7, 1977, at 52. Aquash's body was discovered in February 1976. A Bureau of Indian Affairs coroner attributed her death to exposure and she was buried. When Aquash's family learned of her death and burial, they demanded another autopsy. This autopsy revealed that Aquash had been shot in the back of her neck at point blank range, execution-style. Poor Bear claimed that the FBI had used the Aquash incident to threaten her: "The agents are always talking about Anna Mae . . . they would just talk about the time she died." MESSERSCHMIDT, *supra* note 41, at 32-33.

78. MESSERSCHMIDT, *supra* note 41, at 38.

79. A RADICAL LAWYER, *supra* note 2, at 251.

80. See generally MESSERSCHMIDT, *supra* note 41.

## A COMPARISON OF THE TWO TRIALS

*Butler-Robideau Trial  
Cedar Rapids, Iowa*

—Only a few autopsy photos of dead agents were allowed for fear of prejudicing the jury.

—FBI Special Agent Gary Adams testified to the presence and departure of a red pickup truck at 12:18 p.m., moments after the agents were shot.

—Extensive FBI 302's entered into evidence.

—Witnesses told of FBI coercion in obtaining their testimony.

*FBI analysis for  
Cedar Rapids Trial:  
Reasons for Not Guilty verdict**Peltier Trial  
Fargo, ND*

—All autopsy photos were entered into evidence, plus FBI Academy graduation photos of the two agents.

—FBI Special Agent Gary Adams denied existence of 12:18 p.m. red pickup truck.

—No 302's entered as evidence if agent who wrote it testified.

—FBI coercion of important defense witnesses not allowed to be presented to jury.

—"The Court rulings . . . forced the government to furnish the defense with all 302's prepared by Special Agents who testified for the government."

—"The defense was allowed freedom of questioning of witnesses. . ."

—Defense allowed to present testimony concerning the number of unsolved murders that occurred on Pine Ridge Reservation as well as climate of fear on the reservation.

—History of FBI misconduct allowed as testimony.

—Defense lawyers and members of Butler-Robideau Support Group held frequent meetings and rallies in an effort to educate the public about June 26th and the events leading up to it. National press blackout existed, but local press carried daily related articles.

—The jury was not sequestered.

—"The Court continually overruled government objections . . ." and "[a]s a result, the defense inferred the FBI created a climate of fear on the reservation which precipitated the murders".

—"The Court allowed testimony concerning past activities of the FBI relating to COINTELPRO and subsequently allowed the Church Report into evidence."

—"The defense was uncontrolled in its dealings with the news media. . ."

—"The jury was not sequestered."

—Defense allowed to talk of unsolved murders occurring on Pine Ridge only in a general sense, and were not allowed to exhibit evidence of FBI creation of climate of fear.

—No evidence regarding past history of FBI allowed to be introduced.

—Judge ordered that the only news carried about Peltier could come from the courtroom. Defense lawyers and potential witnesses were not allowed to speak publicly about the trial.

—Jury sequestered under complete control of U.S. Marshall Service.

\* Three additional reasons the FBI gave for the not guilty verdict at the Cedar Rapids trial were: (1) the government was prohibited from entering into evidence certain collateral exhibits; (2) there was a lengthy recess after completion of the government case; (3) the jury had a difficult time putting things together because it was a complicated case. This chart is taken from JIM MESSERSCHMIDT, *THE TRIAL OF LEONARD PELTIER* 40 (South End Press 1983).

Kunstler has offered still other reasons for Peltier's conviction. He considered Peltier's trial judge, Paul Benson, to be "notoriously anti-Indian" and Elliott Taikeff, Peltier's lead counsel, to be "the wrong man for the job."<sup>81</sup> In many respects, Kunstler considered the Fargo prosecution of Peltier similar to the trial of the Chicago 7:

The judge misinterpreted the rules of evidence whenever he could so as to ensure a conviction, and the prosecution faked all kinds of evidence to make sure the defendant was found guilty. Leonard Peltier was framed by the FBI. They menaced and coerced witnesses and threw the law books out the window, just as they did in Chicago.<sup>82</sup>

As Peltier's appellate counsel, Kunstler believed that his client's conviction had been based almost entirely on the strength of a single lie: "[T]hat a .223 shell casing supposedly found in the open trunk of [murdered] agent Jack Coler's car matched an AR-15 rifle falsely attributed to Leonard."<sup>83</sup> Following Peltier's conviction, his lawyers obtained 12,000 pages of FBI files on Peltier through a Freedom of Information Act request.<sup>84</sup> One document proved crucial: [A] FBI teletype, dated October 2, 1975, appeared to rule out as the murder weapon the AR-15 rifle prosecutors claimed was in Peltier's possession when the agents were shot. The teletype, written by a ballistics expert who had been asked to compare *all* the .223 shell casings in evidence with the AR-15 rifle, said: "Recovered .223 caliber Colt rifle . . . contains *different firing pin* than that rifle used

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81. A RADICAL LAWYER, *supra* note 2, at 251.

82. *Id.* at 252. Author Peter Matthiessen concurs with Messerschmidt and Kunstler's assessments:

In the end it was Judge Benson's determination of what the jury should or should not see and hear that became the deciding factor in the trial. While permitting reference to Peltier's past "crimes" (for not one of which had he been tried, far less convicted), and permitting the unrestrained brandishing of gory pictures of the agents' corpses, "bullet-riddled" by this "blood-crazed bunch," not to speak of several weeks of testimony that was mostly immaterial even when not perjured or coerced, Benson forbade the defense to cite the evidence and verdict in the case of Butler and Robideau, and ruled all reference to COINTELPRO and most references to FBI misconduct inadmissible. Due to this judge's apparently biased exercise of his discretion, the jury was never troubled by the strong evidence of fabrication in the many contradictory [FBI witness statements], or by the manipulation of Myrtle Poor Bear, or by much other evidence tending to show that Leonard Peltier was being railroaded into prison. Denied evidence of the whole pattern of fabrications that had laid the foundation for this trial, the jury had no way of knowing the evidence against Peltier was essentially identical to the evidence against the two men already acquitted . . . .

MATTHIESSEN, *supra* note 53, at 359-60.

83. A RADICAL LAWYER, *supra* note 2, at 252.

84. MESSERSCHMIDT, *supra* note 41, at 32.

at [the Pine Ridge Reservation murder] scene."<sup>85</sup> The teletype contradicts the expert's testimony at Peltier's trial. There, the expert testified that he had not finished analyzing all the casings found at the scene at the time he wrote the teletype.<sup>86</sup>

On April 4, 1984, a panel of the Eighth Circuit ordered an evidentiary hearing on the significance of the October 2 teletype. Subsequently, in oral arguments before that court, the government lawyers switched their theory of the case. They abandoned the theory that Peltier shot the agents, but maintained that his conviction should be upheld because he aided and abetted the actual killers. Moreover, the government prosecutors made three startling admissions: (1) they didn't know who killed Coler and Williams; (2) the Myrtle Poor Bear affidavits used to obtain Peltier's extradition were fabricated; and (3) contrary to their position at trial, there was more than one automatic rifle on the compound the day the agents were killed.<sup>87</sup> Nonetheless, on September 11, 1986, the Eighth Circuit affirmed Peltier's conviction.<sup>88</sup>

### *The Few Ignite the Many*

Throughout his career, Kunstler represented many of his clients for free and was forced to supplement his income through speaking engagements, adjunct teaching positions and, later, small parts in movies.<sup>89</sup> In November 1992, Kunstler spoke with passion and eloquence to a large crowd of Peltier

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85. Cheever, *supra* note 58, at 29.

86. See also *United States v. Peltier*, 731 F.2d 550 (8th Cir. 1984). Leonard Peltier has become something of a cause celebre. In 1985, 56 members of the House of Representatives signed onto an amicus brief asking the U.S. Court of Appeals for the Eighth Circuit to grant a new trial. The Peltier case has also entered the pop culture. Rock guitarist "Little Steven" Van Zant reportedly wrote and produced a rap music video about Peltier's ordeal. Director Oliver Stone is said to be working on a movie about the Wounded Knee affair. Cheever, *supra* note 58, at 28. And in 1995, as part of their *1200 Curfews* album, the Indigo Girls released two versions of "Bury My Heart at Wounded Knee." That song makes pointed reference to the disparity between the FBI's ballistics report and the trial testimony.

*We got the federal marshals, we got the covert spies  
We got the liars by the fire, we got the FBI  
They lie in court and get nailed and still Leonard Peltier goes to jail  
(The bullets don't match the gun)  
Bury my heart at Wounded Knee.*

INDIGO GIRLS, *Bury My Heart at Wounded Knee*, on *1200 CURFEWS* (Epic Records 1995).

87. Cheever, *supra* note 58, at 29.

88. *United States v. Peltier*, 800 F.2d 772 (8th Cir. 1986).

89. Between 1949 and 1993, Kunstler taught law at New York Law School, Pace College, the New School for Social Research and Cooper Union. Kunstler's resume at the time of his death listed performances as Jim Morrison's attorney in Oliver Stone's *The Doors*, the sentencing judge in Spike Lee's *Malcolm X*, and a cameo appearance in Brian DePalma's *Carlito's Way*. Resume, *supra* note 27.

supporters at the University of Oklahoma in Norman.<sup>90</sup> True to form, Kunstler characterized Peltier's case as a classic example of a total miscarriage of justice and a symbol of this government's cruel and base treatment of our indigenous peoples.<sup>91</sup> Undoubtedly, Kunstler viewed the speaking engagement as an opportunity to keep pressure on the government to release his friend. Also, the lecture fee would help subsidize Kunstler's representation of Peltier.

Early the next morning, I collected Kunstler at his hotel and drove him to the airport. Kunstler flew from Oklahoma City to the Eighth Circuit Court of Appeals, where former Attorney General Ramsey Clark would argue Peltier's last appeal.<sup>92</sup> After I became an accessory to his petty theft,<sup>93</sup> Kunstler and I scoured the *Daily Oklahoman* for coverage of his speech. Not a word. Kunstler shrugged off the paper's indifference and peppered me with questions about Daniel Friedman, a judge I knew who was sitting on Peltier's Eighth Circuit panel.

On July 7, 1993, Kunstler's seventy-fourth birthday, Judge Friedman issued an opinion denying Peltier's final appeal. Lesser lawyers might have surrendered. Kunstler switched battlefields, and pressed hard for executive clemency.

On April 7, 1995, shortly before his death, Kunstler returned to the University of Oklahoma for the last time.<sup>94</sup> Recent health problems had forced Kunstler to cancel an earlier trip to Oklahoma. Although Kunstler appeared vigorous and inspired many, his mortality was on his mind that night. He joked,

But I am really happy to be here, but that really is no compliment because I'm happy to be anywhere, I must tell you. When I wake up in the morning, read those obituaries, see all my friends that have gone by the way, then I brush my teeth and go out for another day. There may come a day when I won't be able to do that. But we'll await that time when it comes.<sup>95</sup>

Kunstler's prepared remarks, which explored the erosion of the Bill of Rights, were witty, incisive and, like Kunstler himself, unrelenting.<sup>96</sup>

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90. See *supra* note 1 and accompanying text.

91. See A RADICAL LAWYER, *supra* note 2, at 255.

92. Kunstler had argued unsuccessfully for Peltier for 17 years and felt that a different voice might be heard. *Id.* at 253. The night before, Kunstler had impressed upon me his devotion to Peltier by threatening to castrate me if I failed to deliver him to the airport on time.

93. See *supra* note 1 and accompanying text.

94. Although Kunstler by then was in poor health, first year law student Jim Erikson, a longtime personal friend and vice-president of the student chapter of the ACLU, gently lured Kunstler back to Oklahoma.

95. Crusader for Justice: Decades on the Front Line, *supra* note 20.

96. The title of Kunstler's speech was "Crusader for Justice: Decades on the Front Line."

Kunstler reflected on his career, and subtly encouraged others to follow his example. He said

I've often thought of some philosophy for people like myself to live by. Because I am, at seventy-six, one of the oldest practitioners, I guess, who are still in the type of rebellion that I'm in — against the system — to always hope that there are others coming along. It's never a majority of people who preserve the rights of everybody. . . . We're here tonight because better people than we are went down in the dust for us. You have to remember it's the few who ignite the many.<sup>97</sup>

When he had finished his presentation, Kunstler answered questions from the audience. Several queries focused on the status of the Peltier case.<sup>98</sup>

Kunstler stayed late into the night, meeting well wishers and signing copies of his various books.<sup>99</sup> Kunstler, though weary, stayed until the last book had been signed and the last hand had been shaken.

Five months later, Kunstler died from heart failure at Columbia Presbyterian Hospital in New York City.

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Kunstler offended part of his audience — and delighted part of his audience — when he recounted that he had resigned from the national board of the American Civil Liberties Union after the organization agreed to support the right of Nazis to march in Skokie, Illinois, a city with a large Jewish population. He explained:

I believe in many causes of the ACLU, but I have never supported the taking of certain cases. That's because my philosophy is different. [The ACLU's] client is the Constitution and they regard that as the item that has to be defended. In fact, just this week they are arguing that it is all right for the Klan to put up a cross in front of a city hall. They've taken the position they have the right to put up a cross, which the Klan has desecrated by burning it in front of black homes throughout its existence. And therefore when I left the board of the ACLU I left it over the support of Nazis and the Klan marching in [Skokie,] Illinois. And I left the board because of that.

I don't oppose *their* doing it. That is their philosophy; it is not mine. I decide my cases, on what I take, on a very political basis. I try only to take situations — I don't always succeed — where I can feel comfortable at least with the general outlook or aspect of the people I'm representing. It doesn't always work that way, I admit. Life is too fluid.

But the ACLU has its problems, as you know. It lost a lot of supporters over defending the [Skokie,] Illinois situation. It's gotten many of them back. Remember their position is a different one than mine. I don't think mine is the end-all. But I respect them, except that my heart shrivels up in me when I see them defending these sonsofbitches.

*Id.*

97. *Id.*

98. For Kunstler's remarks about the Peltier case, see *infra* pp. 281-82.

99. In addition to countless law review articles, book reviews and editorials, Kunstler authored 13 books between 1941 and 1994. See Resume, *supra* note 20.



